International Convention for the Protection of All Persons from Enforced Disappearance

Distr.: General
23 February 2015
English
Original: Spanish
English, French and Spanish only

UNITED NATIONS
DEPOSITORY
MAY 07 2015
UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

Committee on Enforced Disappearances

Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention

Addendum

Information received from Spain on follow-up to the concluding observations*

[Date received: 16 January 2015]

Report on follow-up to the observations of the Committee on Enforced Disappearances concerning its consideration of the report of Spain

1. The initial report of Spain was submitted to the Committee on Enforced Disappearances in December 2012 and considered by the Committee on 5 and 6 November 2013. In its concluding observations, adopted on 13 November 2013, (CED/CE/ESP/CO/1), the Committee requested that the Government of Spain supply information on the issues raised in paragraphs 12, 24 and 32 of the concluding observations within one year's time.

2. The Government of Spain wishes to thank the Committee for the fruitful dialogue in which it was able to engage during the Committee's consideration of the initial report of Spain and for the flexibility that it has shown with respect to the collection of the information referred to in the above-mentioned paragraphs of the observations.

I. List of issues

3. Before responding to each issue in turn, the Government wishes to reiterate its position with respect to the interpretation of the competence *ratione temporis* of the Committee. At the time of its consideration of the report of Spain, the Committee issued a statement on competence *ratione temporis* which, notwithstanding the wording of article 35 of the Convention, limits the application of the latter to individual communications and sets forth a broad interpretation of competence *ratione temporis*, extending its scope to encompass an unspecified length of time in the past. As stated by Her Excellency, the

* The present document is being issued without formal editing.

Permanent Representative of Spain, in her closing statement during the consideration of the report of Spain on 6 November 2013, Spain does not share that interpretation and wishes, with all due respect for the work of the Committee and its independence, to submit the following considerations.

4. The above-mentioned interpretation of the competence *ratione temporis* of the Committee is contrary to the wording of article 35 of the Convention, which states:

> *Article 35*
>
> *1. The Committee shall have competence solely in respect of enforced disappearances which commenced after entry into force of this Convention.*
>
> *2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.*

5. The limitation of the competence of the Committee in this manner, not only in relation to individual communications, but also more generally, was evident throughout the preparatory work undertaken by the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. At the second meeting of this working group, held in February 2003, the manner in which this issue was resolved is clearly reflected in paragraph 165 of the report of that meeting (E/CN.4/2004/59), which is reproduced below:

> *165. It was pointed out that there were two kinds of retroactivity: that of the instrument itself, and that of the competence of the monitoring body. Delegations agreed that there was no need for an explicit reference to the former in the text, because the general rule that the instrument would apply from the time it entered into force for the State concerned remained valid. As regards the competence of the monitoring body, they supported article II-E, paragraph 1, of the draft, which provided that the monitoring body had competence only in respect of deprivations of liberty which commenced after the entry into force of the instrument.*

6. At the third meeting of the open-ended working group, held in January 2004, this view prevailed, as set out in paragraph 142 of the report, E/CN.4/2005/66:

> *Competence ratione temporis of the monitoring body (art. II-E)*
>
> *142. Many States were of the opinion that the monitoring body would be competent to take up only "enforced disappearances" and not "deprivations of liberty" that occurred after the instrument entered into force.*

7. This is reflected in the fourth and last report of the working group, held in February 2006 (E/CN.4/2006/57*). One of the annexes to that report contains a draft international convention in which article 35 is identical to the one adopted later in 2006. The limited temporal scope of the competence of the Committee was therefore an idea that had been widely accepted during the elaboration of the draft convention. Although, as reflected in the reports, three delegations indicated their intention to make "an interpretative declaration, when ratifying the instrument, whereby certain rights and obligations, such as the right to truth, justice and reparation and those relating to the disappearance of children, would be extended to enforced disappearances which had commenced before the instrument had entered into force but which had not been clarified", the fact of the matter is that no State party to the Convention has proceeded to make such a declaration.

8. The declaration of the Committee regarding its competence *ratione temporis* also runs counter to statements made by the Committee itself at the time that it was urging Member States of the United Nations to ratify the Convention. Indeed, in the letter sent on

25 January 2012 by the Chair of the Committee on the occasion of the first anniversary of the entry into force of the Convention to all permanent missions to the Office of the United Nations at Geneva, he urged States to ratify the Convention, highlighting its preventive character and noting, in particular: "*As stated in its article 35 (1), the Convention deals only with enforced disappearances which commenced after its entry into force for each State party.*" The interpretation adopted by the Committee in November 2013 could have the effect of slowing down progress towards the achievement of universal ratification of the Convention, a process in which Spain has been particularly active, as will have been noted by the Committee.

9. In addition to the above, and as pointed out in the closing statement of Her Excellency, the Permanent Representative of Spain in Geneva, during the consideration of the report of Spain in November 2013, the Committee's broad interpretation of its own competence *ratione temporis* entails a duplication of effort and a clear overlap with other human rights treaty bodies and, in particular, with the Working Group on Enforced or Involuntary Disappearances. As the Committee well knows, the intention to avoid any overlap with other mechanisms of the Human Rights Council or its predecessor, the Commission on Human Rights, was also evident in the course of the preparatory work on the draft Convention. This duplication and overlap also entail an increase in the requisite amount of work and expenditure, which are neither unlimited nor even plentiful, and, even more importantly, divert the attention of the Committee to the consideration of past events, to the detriment of the prevention of cases of enforced disappearance in the present. As the Committee knows, very close to the date of the examination of the initial report of Spain on its implementation of the Convention, Spain received visits from two special procedures with partly overlapping mandates: the Working Group on Enforced or Involuntary Disappearances, which visited the country in September 2013, and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who came to Spain in January 2014. Spain cooperated fully with both of them before, during and after their visits; its willingness to cooperate in this regard makes it clear that the State party's interpretation of the competence *ratione temporis* of the Committee under article 35 of the Convention does not in any way indicate that Spain is seeking to evade an examination of its past.

10. The Government of Spain further notes that the Committee's interpretation of the scope of its own competence has not been applied consistently in relation to all States reviewed up to the present time; nor is there clarity as to whether or not the competence *ratione temporis* of the Committee stretches back for an unlimited time in the past. This state of affairs introduces a disturbing degree of legal uncertainty, which is hardly appropriate for an international human rights instrument. In addition, as Spain indicated in its response to the recommendations of the Working Group on Enforced or Involuntary Disappearances following the Working Group's visit to Spain, it is indisputable that the competence of United Nations entities should in no way extend to events that took place before that international organization was created. Even the Working Group, which is not subject to the same time constraints as the Committee, has rejected individual communications on enforced disappearances that commenced before 1945.

11. In the light of the above arguments, which the Government of Spain respectfully submits to the Committee, it is evident to the Government of Spain that the wording of article 35 and the rules of interpretation set forth in articles 31 to 33 of the Vienna Convention on the Law of Treaties of 1969 clearly place a time limit on the competence of the Committee. Nonetheless, in a demonstration of good faith, which, in accordance with the Vienna Convention, should be the prevailing consideration in the implementation of international treaties, and in a spirit of cooperation with the Committee, Spain has responded to questions which, in the opinion of its Government, clearly fall outside the

Committee's competence. The present report on follow-up to the recommendations of the Committee is being presented in the same spirit of cooperation and good faith.

12. In addition to the above and before entering into a consideration of the specific questions to which the Committee has requested a response within this time frame, the Government of Spain wishes to inform the Committee that, as a result of the observations made by the Committee following its review of the report of Spain, enforced disappearance has been made a **separate offence**, in line with the provisions of the Convention, in the amended Criminal Code which is currently pending before parliament.

II. Replies to the issues raised by the Committee

13. These preliminary clarifications having been provided, the report will now address the issues raised by the Committee in its concluding observations on Spain concerning which it requested a response within one year.

A. Paragraph 12 of the Committee's recommendations

14. The **first** of these issues is raised in **paragraph 12** of the Committee's concluding observations and refers to the term of limitation, to the investigation of enforced disappearances, regardless of the time that has elapsed since they took place and regardless of whether or not there has been a formal complaint, and to "the legal impediments … in domestic law", in the words of the Committee, concerning the investigation of enforced disappearances.

15. With reference to the **statute of limitations**, it should be pointed out that article 131.4 of the Criminal Code of Spain states that the statute of limitations does not apply to any crime against humanity whatsoever. Other cases of enforced disappearance are subject to the same general statutes of limitations as those set out in the Criminal Code.

16. The jurisprudence indicates that the action by which criminal responsibility for the commission of a crime arises commences at the time that a crime is consummated and is circumscribed by its effects (when the criminal action ceases, which may or may not occur at the same time as the consummation of the criminal act); that is, when the agent ceases to act and ceases to do harm to the victim or to the general good.

17. The consummation of an offence is the final criminally relevant phase of the *iter criminis*, or process involved in committing a crime, and takes place when an individual has committed all of the acts that fall within the legal definition of the crime in question and that produce the results or consequences pursued thereby. The crime comes to an end when the criminal action actually ceases.

18. In the case of an enforced disappearance, the type of act that encompasses criminal conduct must be determined in each case in order to establish when the act is completed, since, as a *continuing offence*, the consummation of the crime and the point in time at which its effects come to an end do not coincide (art. 132 of the Criminal Code: "… *from the date of the final offence or the date on which the unlawful situation or conduct comes to an end*").

19. **Firstly**, if the victim is found alive, is freed by his or her captors, is rescued or escapes, the criminal action, which is a continuing crime (the criminal action continues so long as the victim remains in the power of the persons committing the crime), then ceases. The offence, which was consummated at the time of the abduction, has come to an end because the material action in which it consisted has ceased.

20. Similarly, if, following the disappearance, i.e., during the period of confinement, the victim is subjected to ill-treatment, torture or sexual abuse and is later found alive, then the term of the statute of limitations (if death does not supervene) would be determined on the basis of the continuing offence and its aggravating circumstances or the continuing offence in combination with other offences, treated as one. The term of the statute of limitations applying to the continuing criminal action, along with the aggravating circumstances or the more serious crime, as appropriate, would then be deemed to have begun to run at the time that the victim is freed.

21. **Secondly**, in cases where a victim is deprived of life by his or her captors, then the crime, with its aggravating circumstances, or the crime, taken in combination with the crime of homicide or murder, both is consummated and ceases at the time of death; this is the point in time when the commission of the offence is deemed to have come to an end. That is therefore the starting point (the time of the victim's death), in accordance with article 132 of the Criminal Code, from which the term of limitation will be calculated: not before and not after.

22. With respect to **the investigation of enforced disappearances**, regardless of the time that has elapsed since they took place and regardless of whether or not a formal complaint has been made, it is appropriate to recall the jurisprudence established by the Supreme Court and by the European Court of Human Rights. Firstly, in its Judgement No. 101/2012, the Supreme Court dismissed a suit brought by a group of associations for the recovery of historical memory, indicating that Spanish criminal law did not provide for: "so-called 'truth trials', that is to say, trials intended to give rise to a judicial investigation into what appear to have been criminal acts in regard to which it is impossible for legal proceedings to lead to a person being found guilty because prosecution is precluded by reason of grounds for the extinction of criminal responsibility, death, prescription or amnesty." (Finding No.1 of the judgement). The amount of time that has elapsed since the commission of acts that are the subject of a complaint is an important consideration in the Spanish legal order, not only because of the presence of statutes of limitations, but also because the purpose of criminal proceedings in Spain is not to investigate events but rather to identify and punish offenders. Criminal proceedings in Spain therefore do not perform the function of historical investigation. The impossibility of sanctioning guilty parties in certain cases is a factor that has been taken into account by judges and magistrates in Spain when determining that the legal system cannot be used to investigate events that took place in the 1930s and 1940s. This is not to say that it is impossible to carry out investigations in an effort to determine the whereabouts of persons who disappeared during the Spanish Civil War. Judgements No. 75/2014 and No. 478/2013 of the Provincial Court of Madrid both confirmed that criminal proceedings are not the proper avenue for seeking satisfaction for the claims of complainants (regarding the exhumation of the remains of family members in the Valle de los Caídos so that they could be buried in another location). But these judgements did not simply order the cases closed or impede any further investigation. On the contrary, they identify litigation in the administrative court system as the appropriate avenue to be taken in the Spanish legal system, as provided for in the Historical Memory Act of 2007.

23. The time that has elapsed since an act has been committed has also been shown to be a decisive consideration in the jurisprudence of the European Court of Human Rights, which, in its decision of March 2011 in the case of *Gutiérrez Dorado and Dorado Ortiz versus Spain*, found that a complaint regarding the disappearance of a socialist Member of Parliament, Luis Dorado Luque, whose whereabouts have remained unknown since his detention in 1936, was inadmissible. For the European Court, the fact that the complaint had not been submitted until 25 years after the Spanish State had recognized the jurisdiction of the European Court and 70 years after the disappearance took place was a decisive factor.

24. Another of the "impediments" — although it is characterized as being far from the only one — to investigations to which the Committee refers is the **Amnesty Act of 1977**. The Amnesty Act, as Spain has had the opportunity to explain to the procedures that have shown interest in the matter, is not a law promulgated by the dictatorship in order to shield itself, but rather a law adopted by democratically elected parliamentarians who were fully aware of the different dimensions of the important step that they were taking. The law provides for the extinction of criminal responsibility both for those opposing the dictatorship and for those who supported it, and was underpinned by a broad consensus on the part of all political forces regarding both of those dimensions, as attested to by the parliamentary debates that preceded its adoption, the statements made by members of opposition parties and the political commentary that followed. All of their statements make numerous references to the desire for reconciliation and to the conviction that this could only be achieved by forgetting and forgiving. It was this desire and this conviction that led to the passage of the Amnesty Act by a nearly unanimous vote on the part of the democratically elected parliamentarians at the time. In fact, long before the adoption of the Amnesty Act, as far back as 1960, the records of the Sixth Congress of the then-illegal Communist Party of Spain in 1960 show that a general amnesty for all members of both sides was already being proposed.

B. Paragraph 24 of the Committee's recommendations

25. The **second matter** raised by the Committee is discussed in paragraph 24 of the concluding observations and refers to the system of **incommunicado detention**. As the Committee already knows, this system is used only in exceptional cases and was introduced in order to "prevent individuals alleged to be involved in the acts under investigation from escaping justice; violating the victim's legal rights; hiding, altering or destroying evidence related to the commission of the acts in question; or committing further offences" (Criminal Procedure Act, art. 509.1). As a consequence of the particularly strong impact that terrorism has had on Spain, the law also specifically provides for the use of this system in cases of detention of persons linked to armed bands or terrorist groups (Criminal Procedure Act, art. 520 bis).

26. In cases in which the law provides for incommunicado detention, prisoners enjoy the same general rights as other prisoners, such as: the right to be represented by a lawyer; the right to be informed of the charges against them and of the reasons for the deprivation of their liberty; the right to be informed of their rights; the right to remain silent, the right not to give evidence against oneself and the right not to incriminate oneself, in particular; and the right to be examined by a forensic physician, among others (Criminal Procedure Act, art. 520). In addition, incommunicado detention is subject to judicial oversight. Thus, it is stipulated that the measure must be authorized by a judge or court of law (and that the authorizing official must explain the justification for that authorization) for a period that is limited to the amount of time that is strictly necessary to carry out the requisite investigation as a matter of urgency. It is also stipulated that the judge may request information at any time concerning the situation of a person being held in incommunicado detention. Several of the judges in charge of investigating terrorism cases now employ additional safeguards, such as recordings of interrogations and additional medical supervision. These measures were officially set forth in a decision handed down by the National High Court of December 2006 and have been applied in numerous cases of incommunicado detention.

27. In addition, an amendment to the Criminal Procedure Act is under consideration which will incorporate Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon

deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. The draft bill to amend the Criminal Procedure Act for the purpose of expediting legal proceedings, strengthening procedural safeguards and regulating technological investigative methods, which was approved by the Council of Ministers on 5 December 2014, will amend article 527 of the Criminal Procedure Act so that it expressly states that incommunicado detention is an **exceptional regime** which may be applied only pursuant to a reasoned decision by a judge and that the deprivation of certain rights is not automatic but is **"discretionary"**, which is to say that one or more of the following measures may be decided upon:

(a) The detainee's lawyer may be assigned to him or her on an ex officio basis;

(b) The detainee may not meet with his or her lawyer in private;

(c) The detainee may not be allowed to communicate with all or any of the persons with whom he or she would ordinarily be entitled to contact, with the exception of the judicial authorities, the prosecution service and the forensic medical examiner;

(d) The detainee may not be given access to records of proceedings.

28. In addition, these exceptional measures may be granted only under the circumstances provided for in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, which is to be incorporated into Spanish law by means of the draft bill. The circumstances under which the application of the regime of incommunicado detention is permitted are as follows:

(a) Where there is an urgent need to avert serious adverse consequences in terms of the life, liberty or physical integrity of a person;

(b) Where immediate action by the investigating authorities is imperative to prevent placing criminal proceedings in substantial jeopardy.

29. However, the Government would like to draw attention to the fact that the passage of legislative amendments of the scope of the above-mentioned bill or amendments such as those being introduced into the Criminal Code usually take longer to achieve than the period of one year specified by the Committee for receipt of responses from Spain on these issues.

30. As a preventive measure, a national mechanism for the prevention of torture has been established in accordance with the commitment made by Spain upon its ratification of the Optional Protocol to the Convention against the Prevention of Torture (New York, 18 December 2002). The Ombudsman has been designated as the institution responsible for this function under the terms of Organization Act No. 1/2009 of 3 November, which adds a new final provision to Office of the Ombudsman Organization Act No. 3/1981 of 6 April:

(a) **Firstly**, the Ombudsman shall discharge the functions of the national mechanism for the prevention of torture in accordance with the Constitution, the present Act and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) **Secondly**, the Advisory Board is established to provide technical and legal assistance in the exercise of the functions of the national preventive mechanism. It shall be chaired by the deputy to whom the Ombudsman delegates the functions identified in this provision. The corresponding regulations shall determine its structure, composition and functions.

31. All of these provisions ensure that the measures applied during incommunicado detention will be subject to closer oversight.

C. Paragraph 32 of the Committee's recommendations

32. The **third issue** raised by the Committee is discussed in **paragraph 32** of the concluding observations and refers to the adoption of the necessary measures in order to search for **disappeared persons and shed light on their fate**, as well as the establishment of an ad hoc body to carrying out such searches.

33. At the start of 2012, the Department of Rights of Pardon and Other Rights took over the functions of the former Office for the Victims of the Civil War and the Dictatorship. None of the responsibilities of the former Office were eliminated under Historical Memory Act No. 52/2007; instead, its staff, resources and functions were transferred to the Department in their entirety. The Department of Rights of Pardon and Other Rights thus assumed numerous functions in respect of the preservation of historical memory. It continues to keep interested parties abreast of developments and to investigate cases of disappearance by searching through archives and documentation in the various institutions of the State. This is also the focus of the work of the General Administration Agency, which supplements the work carried out by the Autonomous Communities. It should be noted that the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence identified some of the types of work being carried out in Spain by the Autonomous Communities as examples of best practice in this sphere.

34. Within the scope of the Historical Memory Act, the Department of Rights of Pardon and Other Rights carries out functions in relation to:

35. Mapping of grave sites: The Ministry of Justice maintains and updates a map of Civil War grave sites which is accessible to the public and provides valuable information on graves and exhumations. Currently, the map details the location of 2,382 graves on Spanish territory. This map is available at the following link: http://mapadefosas.mjusticia.es/exovi_externo/CargarMapaFosas.htm.

36. The following table provides information on the graves that have been located in the various Autonomous Communities:

Autonomous Communities	*Graves marked on the map*
Andalucia	542
Aragón	595
Canarias	4
Cantabria	7
Castilla y Leon	212
Castilla La Mancha	143
Cataluña	152
Ceuta	1
Madrid	52
Navarra	50
Valencia	86
Extremadura	53
Galicia	50
Baleares	4
La Rioja	8
Melilla	1

Autonomous Communities	*Graves marked on the map*
País Vasco	92
Asturias	324
Murcia	6
Total	**2 382**
Total number of victims identified	**45 134**

37. Public services: The Ministry of Justice keeps different channels of information open for victims, family members and associations seeking to resolve issues that arise regarding the application of the Historical Memory Act and other actions taken in connection with its implementation by government bodies.

38. Financial assistance: the Ministry of the Treasury and Public Administration coordinates two committees, which include representatives of the Ministry of Justice, whose job is to consider and award compensation to victims of the Civil War and of the dictatorship. The Committee for Former Social Prisoners deals with compensation for persons who were imprisoned because of their sexuality. The Committee on Article 10 of the Historical Memory Act deals with compensation in respect of persons killed while defending democracy during the dictatorship.

39. Declarations of Redress and Personal Recognition: These declarations are based on the principle of recognition for victims as set forth in article 2 of the Historical Memory Act, which proclaims the wholly unjust nature of all sentences and punishments issued for purely political or ideological reasons during the Civil War and the dictatorship. This proclamation is supplemented by the declaration made in article 3 concerning the illegitimacy of the courts set up during the Civil War for political, ideological or religious motives, including the Tribunal for the Suppression of Free Masons and Communism, the Court of Public Order, the Political Affairs Courts and the Councils of War, which violated the most basic due process guarantees of the right to a fair trial. More than 1,600 of these declarations have been issued.

40. A database on Spaniards who were killed in the Nazi camps is accessible on the website of the Ministry of Justice. This database, which contains details on 4,400 Spanish nationals who were killed in Nazi concentration camps in Austria and Germany, is a highly useful tool for both researchers and the public. Since it was launched, the database has provided valuable information to members of society thanks to the large-scale effort made by the Ministry of Justice to compile, systematize and digitize all the data that were gathered. The information includes the names, date of birth, place of birth and place of death of all the Spaniards who perished in the Nazi camps in Austria and Germany.

41. Budget allocations for the implementation of the Historical Memory Act: In recent years more than 25 million euros has been allocated to historical memory associations for various projects, including the exhumation of human remains from mass graves of victims of the Civil War. At the present time, government spending constraints make it impossible to open these lines of financing, however.

42. This situation should not be interpreted as reflecting a lack of interest on the part of the Government. As the then Minister for Justice said last September to the Spanish parliament: "Neither the present Government, nor any Government, will ever rest while even one person is still buried in a ditch and that person's family members are wanting to know the whereabouts of the person and where that person is buried. It does not matter what side the person was on in that most uncivil of all wars: the Civil War."

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III. Conclusion

43. The Government wishes to reiterate its utmost willingness to cooperate in good faith with the Committee and with full respect for its impartiality, as has been the case up to now. The Government stands ready to pursue its dialogue with the Committee, including in regard to issues on which it does not share the Committee's views, as is the case concerning its competence *ratione temporis*, for the reasons that have been detailed in full. This readiness to cooperate includes, of course, a willingness to share whatever information the Committee may request regarding the ongoing legislative reforms relating to the issues raised in this report, as well as to other issues touched upon in the Committee's concluding observations.